Supreme Court, U.S.
FILED
DEC 8 1999
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No. 99-537

IN THE SUPREME COURT OF THE UNITED STATES

D. HILL, K. BLACK, T. MEADORS, and J. BECKETT, *Petitioners*,

v.

MACARTHUR RUMBLES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent's argument that there is no "direct" conflict among the circuits mischaracterizes the holdings of the opposing circuit opinions and ignores several important appellate decisions announced after the petition was filed. These rulings exacerbate the disagreement among the circuits, and confirm that the conflict is direct even under respondent's view of what constitutes such a conflict. In light of these decisions, respondent cannot deny that there is an irreconcilable split among the appellate courts concerning § 1997e's exhaustion requirement to inmate claims for damages. Furthermore, respondent has not denied the importance and substantiality of the questions presented. The need for plenary review is acute.

ARGUMENT

According to respondent, the circuit conflict is not direct because those appellate courts that have held that § 1997e requires prisoners to exhaust claims for damages have done so only where damages were not the sole cognizable remedy and "there was something that the administrative grievance process could do for [the inmates]." Opp. at 10, citing *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999); *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998); *Lavista v. Beeler*, No. 97-6295, 1999 WL 970372 (6th Cir. Oct. 26, 1999). Respondent argues that, in contrast, those appellate courts that have excused prisoners from having to exhaust claims for damages have done so only where the inmates sought damages exclusively and "there was nothing else the prison grievance process could do for them." Opp. at 11, citing *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (Appendix 1a); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997).

Respondent's portrayal of the split as turning on whether there was anything the prison grievance process could do for the inmate fails to withstand scrutiny. As illustrated by this case, if respondent had filed a grievance his allegations of officer abuse, supervisory inadequacy, and wrongful promulgation of policy could have been investigated, and corrective measures could have been taken. Appendix 35a-39a. Nothing in California's regulations pertaining to inmate grievances suggests that respondent's allegations would have been disallowed or ignored. *See* Cal. Code Regs. tit. 15, §§ 3084-3085. And this is true regardless of the extent to which respondent's complaint was deemed by the judiciary to contain a cognizable claim for money damages only.

In attempting to explain away the conflict, respondent not only concocts a faulty distinction between the opposing appellate opinions, he ignores important recent decisions that confirm the irreconcilability of the circuit split.

In *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999), a state prisoner brought a claim solely for damages based on allegations that prison employees had been deliberately indifferent to his safety and had provided him with inadequate health care. In direct conflict with the court of appeals' decision in this case, the Sixth Circuit ruled that "prisoners must exhaust the prison's grievance procedures before filing suit in federal court even though the damages remedy sought is not an available remedy in the administrative process." *Id.* at 878. Thus, even under respondent's criteria, the ruling directly conflicts with the lower court's approach in this case because it requires exhaustion where the inmate sought damages exclusively and the allegations were such that "there was nothing else the prison grievance process could do for [the inmate]." Opp. at 11.

This holding was reaffirmed in *Freeman v. Francis*, No. 98-4288, 1999 WL 973623 (6th Cir. Oct. 27, 1999), which erased any remaining doubt about the irreconcilability of the conflict. In *Freeman*, the Sixth Circuit reiterated that § 1997e requires state prisoners to exhaust prison grievance processes even when they seek "solely monetary damages." *Id.* at *1.

> As we explained [in *Wyatt*], although it may make sense to excuse exhaustion of the prisoner's complaint where the prison system has a flat rule declining jurisdiction over such cases, it does not make sense to excuse the failure to

> exhaust when the prison system will hear the case and attempt to correct legitimate complaints, even though it will not pay damages.

Id. Because California's inmate grievance system is analytically indistinguishable from the one in *Freeman*, the Sixth Circuit's position cannot be reconciled with the court of appeals' decision in this case.

Since the petition was filed, the Seventh and Eleventh Circuits also permanently fixed their opposition to the Ninth Circuit's approach. In *Harris v. Garner*, the Eleventh Circuit concluded that "we reaffirm that the term 'available' as used in section 1997e(a) . . . means that a prisoner must exhaust all administrative remedies that are available before filing suit, regardless of their adequacy." 190 F.3d 1279, 1286 (11th Cir. 1999). In *Masssey v. Helman*, the Seventh Circuit concurred with this stance:

> As we have already concluded, whether the administrative process actually produces a result that satisfies the inmate is not the appropriate inquiry. Instead, courts merely need to ask whether the institution has an internal grievance procedure by which prisoners can lodge complaints about prison conditions. If such an administrative process is in place, then sec. 1997e(a) requires inmates to exhaust those procedures before bringing a prison conditions claim under 42 U.S.C. sec. 1983.

No. 99-1459, 1999 WL 989388, at *6 (7th Cir. Nov. 2, 1999).

These decisions confirm that the circuit conflict concerning the applicability of § 1997e's exhaustion requirement to inmate claims for damages is direct and intractable even under respondent's view of what constitutes such a conflict. Accordingly, and because the importance and substantiality of the questions presented have not been denied, the need for plenary review is pronounced and immediate.

CONCLUSION

The petition should be granted.

Dated: December 7, 1999.

Respectfully submitted,

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